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FEDERAL COMMUNICATIONS COMMISSION
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September 20, 1995

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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Attention: Donna L. Kanin


RE: IVDS Construction Deadlines
WT Docket No. 95-131
Comments of ITV, Inc. and IVDS Affiliates, LLC

Dear Mr. Caton:

Enclosed on behalf of ITV, Inc. ("ITV") and IVDS Affiliates, LLC, ("IALC") are the original and nine copies of Comments filed in the above captioned proceeding.

Please contact this law firm if you have any questions with respect to this matter.

Respectfully submitted,


William J. Franklin
Attorney for ITV, Inc. and
IVDS Affiliates, LLC

Encls.
WJF/mtf
cc: ITV, Inc.
IVDS Affiliates, LLC

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Part 95 of the)
Commission's Rules to Modify)
Construction Requirements for)
Interactive Video and Data)
Service (IVDS) Licenses)

WT Docket No. 95-131

To: The Commission

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COMMENTS OF ITV, INC. AND IVDS AFFILIATES, LLC

ITV, Inc. ("ITV") and IVDS Affiliates, LLC ("IALC"), by its attorney and pursuant to Section 1.415 of the Commission's Rules hereby comments on the Commission's above-captioned Notice of Proposed Rulemaking.^{1/} ITV and IALC support the Commission's proposal to eliminate the one-year construction deadline for all Interactive Video and Data Service ("IVDS") licensees, but only in the context of strict enforcement of all additional IVDS deadlines.

DESCRIPTION OF ITV AND IALC

ITV and IALC are commonly owned. ITV is an IVDS licensee for the San Francisco MSA. Accordingly, ITV has experience in assessing the technical and economic realities of the IVDS business. As a result of that assessment, ITV formed IALC to develop a product line of IVDS equipment for ITV's use and for the use of other IVDS licensees. That equipment, which is now

^{1/} 10 FCC Rcd _____ (FCC 95-318, released August 14, 1995), as corrected by Erratum (Mimeo No. 55319, released August 14, 1995) ("NPRM").

type-accepted and operational for an in-market field trial, uses the IVDS spectrum to distribute business and commercial data to subscribers.

ITV and IALC are active participants in numerous IVDS proceedings before the Commission, and filed Comments in the mobile IVDS rulemaking (WT Docket No. 95-47).

THE COMMISSION'S PROPOSAL

At present, Section 95.833(a) of the Commission's Rules specifies that each IVDS licensee must make service available to at least 10 percent of the population or geographic area within its license service area within one year of the grant of the license, 30 percent within three years, and 50 percent within five years. The NPRM proposes to amend Section 95.833(a) of the Commission's Rules to eliminate the one-year construction "build-out" requirement for IVDS licensees. No change is proposed concerning the three-year and five-year construction benchmarks.

The Commission initiated this proceeding on its own motion in response to requests by several IVDS licensees that were awarded their licenses as a result of the initial IVDS auction held July 28-29, 1994. This proceeding paralleled earlier Commission action, which had waived the one-year/10 percent construction deadline for all but one of the eighteen IVDS licenses (including ITV) who had received their licenses as a result of the September 15, 1993, lottery.

THE COMMISSION SHOULD ADOPT ITS PROPOSAL WHILE ADOPTING A POLICY OF STRICT ENFORCEMENT OF ALL FURTHER IVDS CONSTRUCTION AND PAYMENT DEADLINES.

The auction winners whose requests caused the Commission to initiate this proceeding based their requests on arguments that the IVDS equipment market is in early development, and does not yet provide sufficient quantities of suitable, competitively priced equipment. They further argued that technological development will be unnecessarily curtailed if the industry is consigned to the limited scope and application of the current equipment options. While these arguments have been accurate in the past, their persuasiveness will not continue indefinitely.

Competing Sources of IVDS Equipment Are Now Available.

At this time the IVDS equipment market is beginning to develop. For example, IALC has developed a product line of IVDS equipment for commercial data distribution, which it is now marketing to licensees. IALC has identified a vendor of commercial data who could use IVDS distribution services efficiently, and now holds numerous purchase orders for its equipment, contingent on final pricing decisions.

Similarly, another IVDS licensee "has successfully completed testing one application which uses IVDS spectrum to link automatic teller machines (ATMs) to a bank's central computer."^{2/} As the Commission has recognized, the "development of manufacturing

^{2/} Kingdon R. Hughes, 10 FCC Rcd _____ (DA 95-1732, released August 11, 1995) (Wireless Tel. Bureau) (¶3).

has, in fact, come to pass, with five manufacturers having received type acceptance for IVDS equipment...."^{3/}

In other words, the present limited availability of IVDS equipment alternatives could well not continue indefinitely. Elimination of the one-year/10 percent deadline should definitely not be viewed as precedent for the future waiver or elimination of the three-year/30 percent deadline. While IVDS equipment might not be available in sufficient quantity to meet the one-year deadline in early 1996, the three-year deadline should provide adequate time for IVDS equipment to become generally available.

The IVDS Equipment Market Cannot Develop Without Strictly Enforced Construction Deadlines.

Human nature being what it is, very few people will spend money before they have to, especially substantial sums of money. Recognition of this aspect of human nature underlies the Commission's concerns with spectrum warehousing, and the Congressional policy requiring performance deadlines for auctionable radio services.^{4/}

Not surprisingly, IVDS licensees share this trait. In ITV's and IALC's experience, the Commission's suspension of the one-year/10 percent construction deadlines for the IVDS lottery

^{3/} IVDS Payment Waivers, 10 FCC Rcd ____ (FCC 95-367, released September 1, 1995) (¶6).

^{4/} See NPRM, ¶3, citing Section 309(j)(4)(B) of the Communications Act.

winners, and its proposed elimination of that requirement generally, eliminates the motivation for IVDS licensees to purchase any IVDS equipment.^{5/} As a whole, IVDS licensees likely will order only equipment when they must do so, fearing that an early order will cost too much, preclude the consideration of other types of IVDS equipment, and provide less advanced equipment than might be available later.

Thus, the Commission faces a "chicken-and-egg" problem. If there is no equipment, construction deadlines cannot be satisfied through no fault of the licensees. But if there are no construction deadlines, then licensees will not order IVDS equipment. If there are no orders, equipment manufacturers cannot afford to develop IVDS equipment which they cannot sell. To date, there are virtually no operating IVDS systems and extremely limited sales of IVDS equipment.

ITV and IALC suggest that the Commission use this rulemaking to move the IVDS industry off dead-center. Specifically, the Commission should adopt its proposal to eliminate the one-year/10 percent construction deadline while announcing the following policies:

- The Commission will strictly enforce the three-year/30 percent and five-year/50 percent construction deadlines,

^{5/} In the case of the initial lottery winners, the Commission's action was correct. As that deadline approached, only one vendor (Eon) had type-acceptance, and Eon's ability to deliver equipment was generally regarded as uncertain. At that time, IALC had its applications for type-acceptance pending; these applications were in fact granted just before the one-year deadline would have expired.

granting extensions or waivers on a case-by-case basis only for unanticipated causes beyond the licensee's control.

- Where a licensee cannot meet its construction deadline due to the unavailability of IVDS equipment, the Commission will only entertain requests for waivers of the construction deadline if the licensee has placed firm orders of IVDS equipment eighteen (18) months prior to the construction deadline in question.^{6/}

These policies will provide sufficient motivation for IVDS licensees to begin ordering and installing equipment, such that the three-year deadline can generally be satisfied. These policies would serve the public interest by causing licensees to begin nationwide IVDS service, thus making benefit of the spectrum which now sits idle.

The Commission Must Strictly Enforce Its IVDS Auction Installment-Payment Deadlines.

In paragraph 3 of the NPRM, the Commission justified its proposal by observing that:

The use of auctions to award licenses, we believe, reduces the incentives for speculation. Thus, we tentatively conclude that the one-year benchmark is unnecessary. We believe that where licenses are awarded to those who value them most highly, licensees will have sufficient economic incentives to provide service as quickly as possible and to compete effectively against the other licensee in their service area.

^{6/} In other words, the licensee must order equipment to meet its three-year deadline within 18 months of obtaining the license, and to meet its five-year deadline within 42 months of licensing, in order to qualify for a presumption of due diligence with respect to equipment availability. This policy is similar to what the Commission has adopted for other wireless services. See Cellular Unserved Areas, 6 FCC Rcd 6185, 6225 (1991), subseq. history omitted (presumption of due diligence only if licensee orders equipment and initiates all required proceedings within three months of licensing).

In large part, those "sufficient economic incentives to provide service as quickly as possible" are the need for IVDS licensees to generate funds to pay quarterly installments on their auction purchase prices.^{7/}

However, the Commission's implementation of the auction installment plans has substantially rendered those incentives ineffective. Specially, ITV and IALC understand that the staff has drawn a distinction between missing an installment payment and being in default for that payment. In the staff's view, only a separate Commission order can declare a licensee in default. Further, that staff has given all IVDS licensees a three (3) month grace period for each installment payment, i.e., the second-quarter payment which was scheduled for June 30, 1995, now has a payment deadline of September 30, 1995.^{8/}

For this reason, adoption of the Commission's proposal to eliminate the one-year/10 percent construction deadline necessarily requires restoration of the "economic incentives" which result from auctioning IVDS licensees, e.g., strict enforcement of the deadlines for IVDS installment payments and appropriate

^{7/} IVDS licensees now have no other economic incentive to initiate service. Because virtually no IVDS system is operating, by definition they cannot lose subscribers to the other system in their market.

^{8/} See Public Notice, "Wireless Telecommunications Bureau Staff Clarifies 'Grace Period' Rule for IVDS 'Auction' Licensees Paying By Installment Payments" (Mimeo No. 54567, released June 26, 1995).

application of sanctions for untimely payments.^{2/} As the Commission correctly noted in the IVDS Payment Waivers decision:

Expectations that the rules perhaps need not be followed can ... "further encourage ... undesirable conduct and lessen the likelihood that ... only serious, qualified bidders will participate in Commission-sponsored auction."^{10/}

Thus, the Commission has correctly stated that it will "enforce a strict standard" with respect to IVDS payment deadlines.^{11/}

CONCLUSION

Subject to adoption of a policy of strict enforcement of further IVDS deadlines, ITV and IALC support the Commission's proposal to eliminate the one-year construction deadline as set forth herein.

Respectfully Submitted,

ITV, INC.
IVDS AFFILIATES, LLC

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^{2/} See Sections 1.2104(g)(2) and 1.2109(c) of the Commission's Rules.

^{10/} IVDS Payment Waivers, supra, 10 FCC Rcd at ____ (¶10), quoting Order, 9 FCC Rcd 6384 (Com.Car.Bureau).

^{11/} Id. ¶9.